



POLICE DEPARTMENT

MEMORANDUM FOR: Police Commissioner

Re: Detective Christopher Clark
Tax Registry No. 934652
Gang Squad Brooklyn North
Disciplinary Case No. 2014-12239

The above-named member of the Department appeared before me on June 11, 2015, charged with the following:

1. Said Police Officer Christopher Clark, on or about June 13, 2013, at approximately 1546 hours while assigned to Gang Squad Brooklyn North and on duty in the vicinity of [REDACTED], Kings County, did wrongfully use force against Person A, in that he kicked Person A in the head.

P.G. 203-11, Page 1, Paragraph 2 USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Raasheja Page, Esq. Respondent was represented by Michael LaCondi, Esq.

Respondent pleaded not guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDIntroduction

It is not disputed that on June 13, 2013, at about 1545 hours, Respondent was on duty assigned to the Brooklyn North Gang Squad. Respondent was working with then-Police Officer (now-Detective) Duane Percy and Detective Dominick Vasaturo. All three of them were inside a Department vehicle when they spotted Person A smoking marijuana in the vicinity of [REDACTED], Brooklyn. Percy and Vasaturo approached Person A to place him under arrest. Person A resisted their attempt to handcuff him and a struggle ensued. Respondent got out of the Department vehicle to assist Percy and Vasaturo.

CCRB's Case

The CCRB administrative prosecutor offered in evidence a transcript of the recorded interview of Person A conducted by CCRB Investigator Christina Vuong [CCRB Exhibit (CCRBX) 1].¹ The CCRB prosecutor also called Vuong as a witness.

Summary of Person A's CCRB Interview

At his July 23, 2013 CCRB interview, Person A stated that he had just finished smoking a "regular tobacco cigarette" when police officers approached him and told him he was under arrest. Person A asserted that he put up his hands and "just went with the program" because his father taught him not to fight with police officers. Person A asked

¹ The CCRB administrative prosecutor offered Person A's prior statement because Person A failed to appear to testify at this trial. The CCRB administrative prosecutor spoke with Person A the day before this trial commenced and informed Person A that the trial would be taking place and that CCRB had attempted to serve a subpoena on him compelling him to appear and testify at this trial.

what he was being arrested for, but the officers did not respond. One of the officers grabbed his shirt and another punched him in the eye. Only after they had punched and kicked him for five minutes did the officers tell him that he was being arrested for possessing marijuana. Person A asserted that he was not in possession of any marijuana. As the officers punched and kicked him, they repeatedly ordered him to stop resisting and to give them his hands.

At one point, Person A went down to the ground and his head made contact with the ground. Person A put his hands under his stomach. At some point he grabbed a gate and wrapped his legs around the gate. Officers struck his hands and feet with some type of metal object, such as a gun or a baton. One of the officers put his foot on Person A's face and kicked the side of his head causing him to lose consciousness for a minute. The officers stopped using force against him after he was handcuffed.

Christina Vuong

Vuong testified that a video recording of the incident was provided to her by Person A who told her that the video (CCRBX 2) had been recorded by his neighbor, [REDACTED]. Vuong never interviewed [REDACTED]. During the encounter, Person A's father took a photo (CCRBX 3) from his second-floor apartment window. [It is one of 17 photos that were taken by Person A's father. The other photos were entered into evidence as Respondent's Exhibit A, 1-16.] Vuong obtained medical records from Wyckoff Hospital (CCRBX 4) where Person A was taken while in police custody. [The records note lacerations to Person A's left eyebrow and ankles.] Vuong also obtained medical records from Kings County Hospital (CCRBX 5) where Person A went after

being released from custody. [These records note that Person A was diagnosed with an intraventricular hemorrhage.] Vuong also obtained the Mugshot Pedigree photo of Person A that was taken after his arrest. (CCRBX 6). [The photo depicts swelling over his left eye and a bandage on the left side of his face.]

On cross-examination, Vuong agreed that before Respondent became involved in the encounter, Percy punched Person A in the ribs and, at one point, Vasaturo punched Person A. Vuong's investigation did not determine definitively that Respondent had anything to do with Person A's injuries. Vuong confirmed that her investigation concluded that Person A had resisted arrest and that he had assaulted police officers. Vuong also confirmed that her investigation concluded that at one point during the encounter Person A latched on to Respondent's leg. All three of the officers punched Person A on the side of his body and CCRB concluded that this force was justified. Person A's allegations that Percy and Vasaturo had used wrongful force against him were exonerated by CCRB and an Internal Affairs Bureau investigation into the incident resulted in exoneration on all allegations of unnecessary force.

Person A consistently claimed that he did not have marijuana on him but Vuong concluded that this claim was not credible because a field test on the substance that was removed from Person A came back positive for marijuana. Although Person A alleged that he had been struck with a gun or a metal baton, Vuong determined that this never occurred. Person A made inconsistent claims with regard to the injuries he sustained in that he gave differing locations of injuries and differing accounts of whether he lost consciousness. Person A has filed a lawsuit regarding this incident in which he is seeking \$7,000,000.00 in damages.

Respondent's Case

Respondent called Detectives Percy and Vasaturo as witnesses and he testified on his own behalf.

Detective Duane Percy

Percy recalled that as he and Vasaturo approached Person A, he dropped the marijuana cigarette he had been smoking and attempted to step on it. The officers attempted to place Person A under arrest, but he refused to put his hands behind his back and took a swing at Percy. A struggle resulted in which Person A went down to the ground. Person A kicked and punched them and grabbed Percy's holster. Percy punched Person A in the ribs to defend himself and to get access to Person A's hands. Percy never saw Respondent kick Person A in the head. At the station house, Person A told Percy, "I'm going to sue you motherfuckers."

On cross-examination, Percy testified that although Person A had punched him in the face, he did not suffer any facial bruising.

Detective Dominick Vasaturo

Vasaturo recalled that when he and Percy approached Person A, he took a swing at Vasaturo and refused to be handcuffed. The officers wrestled with Person A on the ground. Because Person A had not been frisked, they did not know if he possessed a weapon. Person A kicked and punched them and Vasaturo punched Person A in the face. At no point did he see Respondent kick Person A. Respondent called for backup. It took

ten minutes and six or seven officers to finally successfully handcuff Person A. At the station house, Person A told Vasaturo, "I'm going to get you motherfuckers. I'm going to get money out of this."

On cross-examination, Vasaturo testified that Person A had swung at both him and Percy, but the punch directed at him did not make contact.

Respondent

Respondent, an 11-year member of the Department, testified that he only left the vehicle and joined Percy and Vasaturo after he saw "everybody go to the floor." Respondent tried to grab Person A's hands in order to handcuff him. Respondent was standing near Person A's head, trying to get Person A's arms behind his back, when Person A wrapped his arms around Respondent's legs. This caused Respondent to fall to the ground. Respondent tried to get up and kicked Person A in his shoulder area to try to break free from Person A's grip. Respondent also punched Person A in the ribs. He never kicked Person A in the head. When Respondent got up, Person A grabbed his legs again. This time Respondent used his arm to brace himself on the wall to break his fall. Several times Person A grabbed one or both of Respondent's legs, and Respondent kicked his legs to break free. It took the arrival of four more officers before Person A could be successfully handcuffed.

On cross-examination, Respondent acknowledged that at his CCRB interview he had stated that he had kicked Person A's shoulder to try to get out of the hold that Person A had on his leg. Respondent confirmed that he did not seek any medical attention after this encounter.

FINDINGS AND ANALYSIS

Respondent is charged with wrongfully using force against Person A by kicking him in the head. Person A failed to appear to testify at this trial even though he was aware that CCRB had attempted to serve a subpoena on him to compel his appearance. As a result of his willful failure to appear, the CCRB administrative prosecutor offered the transcript of his CCRB interview as hearsay evidence.

Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,² hearsay testimony may be found to be insufficient to support a finding of guilt in a disciplinary trial even where the hearsay testimony is supported by circumstantial evidence.³ Hearsay must be assessed to determine whether it can be relied upon because it is believable.⁴ An important aspect of this assessment consists of ascertaining whether the record contains independent evidence which either corroborates a hearsay claim or is inconsistent with a hearsay claim.⁵

Here, Person A made hearsay declarations which are inconsistent with evidentiary determinations made by CCRB Investigator Vuong. Although at his CCRB interview Person A claimed that he had been smoking a "regular tobacco cigarette" when the police officers approached him, Vuong conceded that this claim was not credible because the substance that was recovered from Person A field tested positive for marijuana. Person A also claimed at his CCRB interview that he had been struck with either a gun or a metal baton. However, Vuong determined that none of the officers had struck him with

² RCNY Title 38, 15-04(e)(1).

³ See *Eppler v. Van Alstyne*, 93 AD2d 930 (1983).

⁴ See *People ex. rel. Vega v. Smith*, 66 NY2d 130 (1985); *Ayala v. Ward*, 170 AD2d 235 (1991).

⁵ See *Grassman v. Kralik*, 217 AD2d 625 (1995).

either a gun, or an asp or a baton. Person A also claimed at his CCRB interview that when the officers approached him and told him he was under arrest he merely put up his hands and "just went with the program" because his father had told him not to fight with officers. However, inconsistent with this claim, Person A admitted at his interview that the officers had repeatedly ordered him to stop resisting. Most significantly, Vuong determined that not only did Person A resist arrest, she further concluded that he had assaulted Percy and Vasaturo. Vuong also determined that Person A made inconsistent claims regarding the injuries he supposedly sustained in that he offered different accounts as to where on his body he was struck and whether he ever lost consciousness.

The believability of Person A's hearsay declarations must also be evaluated in light of the civil legal action he has filed regarding this incident in which he is seeking \$7,000,000.00 in damages. Since he did not appear to testify at his trial, Respondent's attorney did not have the opportunity to cross-examine him regarding whether the claims he made at his CCRB interview were affected by his pecuniary interest in his lawsuit.

Although the Mugshot Pedigree photo of Person A's face that was taken after his arrest (CCRBX 6) depicts swelling over his left eye and a bandage on the left side of his face, since Person A claimed that he was punched in the face and since he acknowledged that his face hit the pavement, this injury does not support a finding that only a kick to the head by Respondent could have caused these injuries.

Also, although the CCRB administrative prosecutor offered medical records from Wyckoff Hospital, where Person A was taken while he was still in police custody, and medical records from Kings County Hospital, where Person A went himself after being released from custody, when Respondent's attorney asked Vuong whether her

investigation had definitively determined that Respondent was personally responsible for any of the injuries to Person A, she answered, "No."

Also, although the CCRB administrative prosecutor offered a video into evidence (CCRBX 2), this grainy video, which was recorded at ground level from a position behind a fence where Respondent and Person A are barely visible in the video, is of no value in determining whether Respondent's foot made contact with Person A's head.

Finally, the CCRB administrative prosecutor argued that the photograph (CCRBX 3) of Respondent standing over Person A clearly shows Respondent's foot contacting Person A's head. However, since this photo was taken from a second floor window with a nearly straight downward camera angle, the photo does not clearly establish that Respondent's left foot actually made contact with Person A's head.

However, even if Respondent's left foot did make contact with Person A's head, this does not establish that Respondent deliberately kicked or stepped on Person A's head. Respondent stated at his CCRB interview that he had kicked Person A's shoulder area as he was trying to get his right leg out of the hold that Person A had on his right leg. The photo (CCRBX 3) corroborates Respondent's claim not only that Person A wrapped his right arm around Respondent's right leg, but also that Person A's grabbing action caused Respondent to lose his balance because Respondent is seen in the photo reaching out with his left arm to put his left hand against a wall for balance support. Thus, even if Respondent's foot made contact with Person A's head and not his shoulder, since Respondent was off balance as a result of Person A's action of grabbing Respondent's right leg, the photo does not prove that Respondent deliberately kicked Person A in the head.

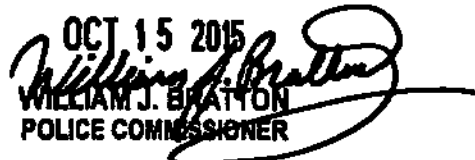
In conclusion, since the CCRB administrative prosecutor did not meet her burden of presenting credible evidence which proves this charge by a preponderance of the evidence, Respondent is found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials

APPROVED

OCT 15 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER